

Volume 6

Pages 778 - 806

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE VINCE CHHABRIA

JESSE PEREZ,)	
)	
Plaintiff,)	
)	
VS.)	No. C 13-5359 VC
)	
A. GATES, et al,)	
)	San Francisco, California
Defendants.)	Tuesday
)	November 24, 2015
)	11:00 a.m.

TRANSCRIPT OF JURY TRIAL PROCEEDINGS

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PROCEEDINGS

P R O C E E D I N G S

NOVEMBER 24, 2015

11:24 A.M.

(Proceedings held in open court, outside
the presence and hearing of the jury.)

THE CLERK: Calling Case No. 13-CV-5359, Perez v.
Gates, et al.

Counsel, please state your appearances.

MR. LEE: Randall Lee, Matthew Benedetto and Katie
Moran for Mr. Perez, who is present.

THE COURT: Good morning.

MS. NYGAARD: Good morning. Jennifer Nygaard and
Elliott Seals from the California Attorney General's Office
representing the five defendants, who are all still present
here.

THE COURT: Good morning.

MS. NYGAARD: Good morning.

THE COURT: I'm handing to Kristen my proposed
response to their question.

(Whereupon document was tendered to counsel.)

THE COURT: You got a copy of the question, right?

MR. LEE: Yes.

MS. NYGAARD: Yes.

(Brief pause.)

MR. SEALS: Good morning, your Honor.

THE COURT: Good morning.

1 **MR. LEE:** Your Honor, from our perspective, this
2 seems like an appropriate response.

3 I would suggest that it may be worth adding one additional
4 mention, just to remind the jurors that ultimately they need to
5 rely on their memories of the evidence in the record.

6 **THE COURT:** Okay. There was actually something --
7 there was some language to that effect in the Ninth Circuit
8 instruction that I think I didn't include in my proposed
9 response. I could just incorporate that.

10 **MR. LEE:** Right. That would be our proposal.

11 **MS. NYGAARD:** Defendants would actually object to the
12 readback portion of the response. We don't think it's
13 necessarily appropriate.

14 And the model jury instructions don't mention readbacks.
15 Based on my understanding, it's sort of been discouraged in the
16 past by some Courts.

17 **THE COURT:** Okay. So are you saying that you think
18 it would be improper to allow the jury to hear readback? It
19 would be, like, legally erroneous?

20 **MR. SEALS:** I think it's our position that -- yes,
21 that it would be improper to read back portions of the
22 transcript to the jury.

23 **THE COURT:** Okay. I take it you don't have at your
24 fingertips a case cite for that proposition?

25 **MR. SEALS:** I have a case. I don't fully -- I

1 haven't fully read the case, just as a warning.

2 **THE COURT:** Which case?

3 **MR. SEALS:** *United States v Damsky*, 740 F.2d, 134.

4 It's a Second Circuit case.

5 **THE COURT:** And that stands for the proposition that,
6 what?

7 **MR. SEALS:** The practice -- it stands for the
8 proposition that readbacks of testimony have been discouraged.

9 **THE COURT:** Discouraged?

10 **MR. SEALS:** Sorry. I think it's the inverse
11 actually. I apologize.

12 Let me consult with my co-counsel for one second.

13 (Discussion held off the record between defense
14 counsel.)

15 **MR. SEALS:** Okay, your Honor. Thank you for making
16 me read that one more time. Defendants withdraw their
17 objection, I guess.

18 **THE COURT:** So what's the language from -- what's the
19 language from the -- I didn't bring the Ninth Circuit model
20 instruction out with me. What's the language about independent
21 memory controlling?

22 **MR. LEE:** Well, there is a line from the taking notes
23 instruction, 1.14, which could probably be adapted. That one
24 says:

25 "Whether or not you take notes, you should rely

1 on your own memory of the evidence. Notes are only
2 to assist your memory. You should not be overly
3 influenced by your notes or those of your fellow
4 jurors."

5 So I think the concept is similar, which is that --

6 **THE COURT:** Your memory controls rather than the
7 readback?

8 **MR. LEE:** Well, I guess it's your memory of the
9 evidence as a whole, really. It's -- it's consistent with your
10 instruction not to consider any portion of the testimony in
11 isolation.

12 **THE COURT:** Okay. Let me just pull up the model. I
13 think there was actually something in that, in that very
14 instruction about readbacks.

15 On the issue of memory, I'm just going to go back and
16 look.

17 (Brief pause.)

18 **MR. LEE:** Yeah. I mean it says:

19 "During deliberations, you will have to make your
20 decision based on what you recall of the evidence.
21 You will not have a transcript of the trial."

22 **THE COURT:** Yeah. It says "your recollection" in
23 3.2(a), which governs readback or playback. It says:

24 "Your recollection and understanding of the
25 testimony controls."

1 I just think I'll add that sentence at the end.

2 "Your recollection and understanding of the
3 testimony controls."

4 **MR. SEALS:** Did you say 3.2, your Honor?

5 **THE COURT:** 3.2(a).

6 I wonder if you have an outdated version.

7 **MS. NYGAARD:** Yeah. Ours must be outdated.

8 **THE COURT:** Well, it just includes a sentence that
9 says, literally:

10 "Your recollection and understanding of the
11 testimony controls."

12 So I propose to add that at the end.

13 **MR. SEALS:** That's fine with the defendants.

14 **MR. LEE:** That would be fine with us.

15 **THE COURT:** Frankly, I don't understand why we just
16 don't tell them that at the outset; that they can ask for
17 readback. I don't see what's wrong with -- I don't understand
18 why we sort of hide the ball from them in that regard.

19 But in any event, I will -- I'll send them back that note
20 and I assume they will promptly request readback of a portion
21 of the testimony.

22 Sorry. Did you have something?

23 **MR. SEALS:** So with regard to the portion that they
24 request be read back, will the parties be given an opportunity
25 to --

1 **THE COURT:** Oh, of course. I will have you back here
2 to talk about whether you think anything should be added for
3 context.

4 And then an additional question is whether they should be
5 required to hear the readback in open court or whether the
6 court reporter can go in to the jury room and do it. In
7 criminal cases, I think that it has to be -- I think it's
8 required that it be in open court. I think if both parties
9 consent in a civil case, it could be done in the jury room with
10 the court reporter.

11 I will say that my personal view is that it would be
12 better to have the readback take place in open court because
13 it -- there's just sort of more control over the process that
14 way.

15 But if both sides were to consent to having it done in the
16 jury room, I'm -- I wouldn't override that.

17 **MR. LEE:** Okay.

18 **THE COURT:** So think about that --

19 **MR. LEE:** Okay. Will do.

20 **THE COURT:** -- while we wait for their request.

21 Thank you.

22 **MR. LEE:** Okay. Thank you.

23 **MR. SEALS:** Thank you.

24 **THE CLERK:** Court is in recess.
25

1 (Whereupon proceedings were adjourned for jury
2 deliberations from 11:34 a.m. until 1:11 p.m.)

3 **THE COURT:** You don't need to make your appearances
4 again. We are all painfully aware of who each other is at this
5 point.

6 Kristen is giving you my proposed response to the jury.

7 (Whereupon document was tendered to counsel.)

8 **THE COURT:** And the reason I sought clarification,
9 propose to seek clarification from them about whether they want
10 the entire testimony of these two witnesses read back is, I
11 want to give them a chance. I mean, if they can identify
12 something really narrow that would obviate the need to do
13 readback of the entire testimony, it seems like we should
14 consider that at least. Give you both an opportunity to
15 address it after they specify what they want to hear.

16 But I thought I should just clarify that with them before
17 proceeding on the testimony of those two witnesses.

18 (Brief pause.)

19 **MR. LEE:** Your Honor, we're comfortable with the
20 Court's proposed response.

21 **MR. SEALS:** Defendants are comfortable, also. We
22 would object to the over-breadth of what they requested be read
23 back, but if they can narrow it down, we think that may be
24 appropriate.

25 We're also curious about the Court's feeling about

1 providing any further instruction to the jury regarding the
2 timing of their deliberations or something regarding -- you
3 now, we gave them the *Allen* charge yesterday.

4 **THE COURT:** Do you mean you -- are you suggesting you
5 want me to tell them that there is some time limit or
6 something?

7 **MR. SEALS:** No, that's not what I'm suggesting, your
8 Honor. Just in terms of their -- how they should be -- I guess
9 maybe something from the *Allen* charge regarding their need to
10 maintain their -- to vote -- to not violate their conscience
11 in anything --

12 **THE COURT:** All they have done here is ask for
13 readback. I mean, I don't think any indication has been given
14 that they need any further instruction with respect to the
15 possibility that they are in disagreement.

16 **MR. SEALS:** Maybe I'll address that further if their
17 response is something that requires anything further.

18 **THE COURT:** The only additional question I have is --
19 you know, we could be a little more suggestive and say: Do you
20 mean that you wish to have Pimentel's entire testimony read
21 back to you or is there some portion you request?

22 And do you mean that you wish to have Perez's entire
23 testimony from the first day read back to you or is there
24 something portion you request?

25 Do you want me to add the "or is there some portion you

1 request"?

2 **MR. LEE:** I think in light of the circumstances, that
3 would make sense.

4 **THE COURT:** Okay.

5 **MR. SEALS:** Yes, your Honor.

6 **THE COURT:** We'll see what they come up with. I
7 would say probably -- I'll proceed with my criminal calendar
8 right now, which is scheduled for 1:00 o'clock, but I would say
9 stick around. Just hang out. We could be interrupted as soon
10 as another note comes back. We could interrupt the criminal
11 calendar to deal with that. Okay?

12 **MR. LEE:** All right.

13 **THE COURT:** All right. So I'll send this back to
14 them. I'll be back in just a minute to begin the criminal
15 calendar.

16 **MR. LEE:** Okay.

17 (Whereupon proceedings were adjourned for jury
18 deliberations from 1:16 p.m. until 2:37 p.m.)

19 **THE CLERK:** Remain seated. Court is back in session.

20 (Whereupon document was tendered to counsel.)

21 **THE COURT:** Go ahead and take as much time as you
22 need to review what I am proposing.

23 (Brief pause.)

24 **THE COURT:** When is your flight, Mr. Lee?

25 **MR. LEE:** 6:30 this evening.

1 **THE COURT:** This evening?

2 **MR. LEE:** Well, back to L.A. And then I'm -- as
3 Kristen may have mentioned, I'm going to visit my son in
4 New York, tomorrow.

5 I mean, it does -- this does raise -- if we encourage them
6 to come back tomorrow, it does raise -- if there is to be a
7 damages portion, then there is actually -- it raises the
8 likelihood that this will not conclude by the end of the day
9 tomorrow.

10 **THE COURT:** Yeah. And then we'll just have to deal
11 with that.

12 I mean, are you suggesting that I remove the reference to
13 coming back to tomorrow? I mean, I certainly wouldn't want to
14 suggest to them that they have to reach a verdict -- they have
15 to make a final decision on whether they can reach a verdict
16 today.

17 **MR. LEE:** Right, right.

18 **THE COURT:** If they come to the conclusion that they
19 ought to keep deliberating tomorrow, I wouldn't want to
20 preclude them from doing that.

21 **MR. LEE:** Agreed. Agreed.

22 **THE COURT:** Okay?

23 **MR. SEALS:** I think defendants' position, we believe
24 the first sentence of this is appropriate and we're not sure if
25 the rest is necessary. We think that it's sort of a

1 reiteration of previous responses that have been given to the
2 jury and my understanding is that Allen instructions are
3 generally only given once.

4 So it's not a full Allen instruction, but it's kind of
5 like a reiteration, and I feel that the first sentence properly
6 responds to their question.

7 **THE COURT:** Mr. Lee, any response to that?

8 **MR. LEE:** Well, I certainly don't think it's improper
9 to give this. I mean, I think that the notion of multiple
10 Allen instructions is really limited to the criminal context.
11 So I don't think it's improper.

12 I mean, maybe to address Mr. Seals' point, we could -- at
13 the end of this second sentence where we encourage the jury to
14 essentially continue deliberating, the Court could add a phrase
15 that says something to the effect of "if you believe that
16 further deliberations might be fruitful," or something like
17 that. So it softens it just ever so slightly. And then
18 continue with the balance of the response as drafted.

19 **MR. SEALS:** I feel that the first sentence still,
20 with the, "You must keep deliberating with respect to the
21 issues," it implies that they still have the opportunity to
22 continue deliberating. There is no -- there is no pressure on
23 them to stop in that first sentence.

24 (Brief pause.)

25 **THE COURT:** I mean, I agree that there is no pressure

1 on them to stop -- the thing that I find weird about this is
2 that it wasn't that long ago that they were asking questions
3 about readback and, you know, I -- and we asked a clarification
4 question of them about what they want read back and then they
5 come back with this.

6 And that leaves me like, you know, a little concerned that
7 maybe they haven't made their -- you know, their absolute best
8 effort. And that's why I was thinking that, you know, instead
9 of just giving them that first sentence, that we sort of try to
10 remind them of the importance of reaching a unanimous verdict
11 without -- you know, without saying: Hey, if you don't reach a
12 unanimous verdict with respect to some of these defendants,
13 there is going to be a mistrial, and we might have to do all
14 this all over again, and we're going to waste a bunch of money.
15 I mean, we wouldn't want to say something like that.

16 But sort of given the -- you know, and I don't give
17 this -- I don't -- you know, I'm not suggesting that sort of
18 reflexively. I'm suggesting, you know, sort of based on the
19 sequence of notes that has come back from the jury. And the
20 concern that, you know, it wasn't that long ago that they were
21 contemplating doing readback and now all of a sudden they might
22 be asking permission to throw up their hands.

23 I was just thinking given that -- and it's not like -- I
24 mean, what's today? Tuesday?

25 **MR. LEE:** Tuesday.

1 **MR. SEALS:** Tuesday.

2 **THE COURT:** They have been deliberating for two days.
3 This is a civil rights case involving five defendants. I mean,
4 you know, I don't know if it's that, like, crazy for them to be
5 deliberating for two days on this and for them to come back and
6 deliberate for another day.

7 **MR. LEE:** I would agree with all of that, your Honor.
8 I don't see any harm in giving this instruction.

9 **THE COURT:** But I -- I liked your suggestion of
10 adding at the end of second sentence, "if you believe that
11 further deliberation would have a" -- I slightly tweaked what
12 you suggested. I wrote:

13 "...if you believe that further deliberation
14 would have a chance of succeeding."

15 **MR. LEE:** Sounds good.

16 **MR. SEALS:** I think defendants would stand by our
17 objection.

18 **THE COURT:** Okay. Okay. I'm going to give them
19 this. I'm going to give them this instruction.

20 **MR. LEE:** Okay.

21 **THE COURT:** As revised. As I just recited.

22 **MR. LEE:** Okay. Thank you, your Honor.

23 **THE COURT:** Thank you.

24 **THE CLERK:** Court is in recess.
25

1 (Whereupon proceedings were adjourned for jury
2 deliberations from 2:46 p.m. until 4:33 p.m.)

3 **THE COURT:** Okay. So I'm not -- I believe Kristen
4 didn't give you this note, but what the jury has said is --
5 they have indicated on this form that they have reached a
6 unanimous verdict, but then they have a note that says:

7 "We're hopelessly deadlocked on one charge for
8 two defendants."

9 I think that's the end of the matter. I mean, does
10 anybody disagree?

11 **MR. LEE:** No, your Honor.

12 **MS. NYGAARD:** No.

13 **THE COURT:** Obviously, there could be any number of
14 permutations to this, but one question that had me scratching
15 my head is if the -- now what they say is:

16 "We're hopelessly deadlocked on one charge for
17 two defendants."

18 I don't know if they consider the -- the malicious thing
19 to be a charge, but if they are deadlocked on maliciousness
20 with respect to two defendants, how would we deal with that?

21 I mean, this is sort of a -- I'm sort of going back to
22 when we put this together before the trial and I had this sort
23 of nagging doubt about whether we should put maliciousness in
24 the first phase of the trial. This question sort of makes me
25 think that we probably shouldn't have. And we may be worrying

1 about nothing. That may not be what -- where the jury is.

2 I think the answer is that if the jury is deadlocked on
3 maliciousness, we would not go forward at least with respect to
4 those two defendants on punitive damages and there would have
5 to be -- I guess there would have to be another trial with
6 another jury on the question of punitive damages at a later
7 time.

8 Does that sound right?

9 **MR. LEE:** I think that sounds right, your Honor.

10 **MR. SEALS:** I believe so, your Honor.

11 **THE COURT:** Which would be a little bit weird, but --
12 and unfortunate. But, okay.

13 With that, Kristen, why don't you bring in the jury?

14 One other thing. If -- will there be -- I mean, before I
15 declare a mistrial, is there anything that anybody is going to
16 want to say to me or can I just go ahead and declare a
17 mistrial? Do you want to do a quick sidebar to see if there is
18 any sort of issue you want to raise before I declare a
19 mistrial?

20 **MR. SEALS:** I think the defendants would appreciate a
21 sidebar, just for a short opportunity.

22 **THE COURT:** Okay. All right. Very good.

23 (Brief pause.)

24 **THE COURT:** Do you want me to poll the jury on the
25 deadlock or can I just ask the foreperson?

1 **MR. LEE:** No need to poll the jury on our account.

2 (Discussion held off the record between defense
3 counsel.)

4 **THE COURT:** Not where they stand, just whether they
5 all believe they are deadlocked.

6 **MR. SEALS:** No.

7 **THE COURT:** Just the foreperson?

8 **MR. SEALS:** Yes.

9 **THE COURT:** Okay.

10 (Jury enters courtroom at 4:37 p.m.)

11 **THE COURT:** Please be seated.

12 Okay. My understanding is that the jury has concluded its
13 deliberations.

14 Ms. Williams, are you the foreperson?

15 **FOREPERSON WILLIAMS:** Yes.

16 **THE COURT:** And you've concluded your deliberations?

17 **FOREPERSON WILLIAMS:** Yes.

18 **THE COURT:** And you have indicated in a note that the
19 jury is hopelessly deadlocked with respect to one count for two
20 of the defendants, is that correct?

21 **FOREPERSON WILLIAMS:** Yes.

22 **THE COURT:** You are of the view that the jury is
23 hopelessly deadlocked with respect to that one count for those
24 two defendants?

25 **FOREPERSON WILLIAMS:** Yes.

1 **THE COURT:** And is it each juror's view that the jury
2 is hopelessly deadlocked with respect to that one count for the
3 two defendants?

4 **FOREPERSON WILLIAMS:** Yes.

5 (Jury panel nodding affirmatively.)

6 **THE COURT:** Okay. For the record, I'm seeing
7 everybody nodding their head.

8 Okay. Why don't you give me the verdict form?

9 (Whereupon, document was tendered to the Court.)

10 **THE COURT:** Okay, Ms. Melen, you can read the
11 verdict?

12 **THE CLERK:** Ladies and gentlemen of the jury, listen
13 to your verdict as it will stand recorded. Omitting the court
14 and caption.

15 Based on the Court's instruction about the applicable law,
16 we, the jury, unanimously answer the questions submitted to us
17 as follows:

18 Question 1: Did the plaintiff, Jesse Perez, prove, by a
19 preponderance of the evidence, that one or more of the
20 defendants violated Perez's First Amendment rights?

21 Sean Burris: No.

22 Anthony Gates: Yes.

23 Daniel Gongora: Yes.

24 Eric Healy: Yes.

25 Guillermo Pimentel: Yes.

1 Question 2: Did the plaintiff, Jesse Perez, prove, by a
2 preponderance of the evidence, that two or more of the
3 defendants conspired to violate Perez's First Amendment rights?

4 Sean Burris: No.

5 Anthony Gates: No answer.

6 Daniel Gongora: No.

7 Eric Healy: No answer.

8 By Pimentel: No.

9 If your answer to Questions 1 or 2 is "yes" as to any
10 defendant, proceed to Question 3.

11 Question 3: Do you find, by a preponderance of the
12 evidence, that one or more of the following defendant's conduct
13 was malicious, oppressive or in reckless disregard of Plaintiff
14 Jesse Perez's constitutional rights?

15 Sean Burris: No answer.

16 Anthony Gates: Yes.

17 Daniel Gongora: No.

18 Eric Healy: No.

19 Guillermo Pimentel: No.

20 The presiding juror shall sign and date this special
21 verdict form and return it to the Court. Dated November 24th,
22 2015. By Dana Williams, presiding juror.

23 Is this your true and correct verdict?

24 **FOREPERSON WILLIAMS:** Yes.

25 (Jury panel responded affirmatively.)

1 **THE COURT:** The record will reflect that each juror
2 responded to that question with a "yes."

3 Ms. Melen, could I have that verdict form?

4 (Whereupon, document was tendered to the Court.)

5 **THE COURT:** Thank you.

6 Okay. So thank you, ladies and gentlemen. I'm going to
7 have a brief sidebar with the lawyers right now, if you can
8 just give me one moment.

9 (Proceedings held at sidebar.)

10 **THE COURT:** Okay. So I will declare a mistrial with
11 respect to the Gates and Healy with respect to Count 2.

12 And that would be the -- that would be it, right?

13 **MR. BENEDETTO:** Yes.

14 **THE COURT:** Is there anything anyone wants to say
15 about that?

16 **MR. SEALS:** Not about that your Honor, but the
17 defendants would like the jury to be polled on the responses to
18 the questions.

19 **THE COURT:** Okay.

20 **MR. LEE:** We don't have anything to add, your Honor.

21 **THE COURT:** I'm going to poll them just by saying:
22 Does that accurately reflect the verdict? I'm not polling them
23 about what their answer to the question is.

24 **MR. SEALS:** Correct. But each individual juror.

25 **THE COURT:** Okay.

1 What should I tell them about how long -- how long the
2 presentation is going to be tomorrow information?

3 **MR. BENEDETTO:** 45 minutes, max, from us.

4 **MR. SEALS:** I'd say 45 minutes.

5 **MS. NYGAARD:** Just punitive damages, an hour. An
6 hour max.

7 **THE COURT:** Okay. All right. Anything else?

8 **MR. BENEDETTO:** No.

9 **MR. LEE:** No, your Honor. Thanks.

10 (Proceedings held in open court.)

11 **THE COURT:** So to the jurors, the parties have
12 requested that I poll the jury. Even though each of you shook
13 your head "yes" in response to the question whether this
14 reflected the jury's conclusions, I need to ask you each
15 individually whether the verdict form that Ms. Melen read
16 accurately reflects the jury's conclusions. I'm not asking
17 whether they accurately reflected your own personal
18 conclusions, and I'm not asking you how you come out one way or
19 another on these things. I'm only asking you whether the
20 verdict form that Ms. Melen read accurately reflects where the
21 jury came out on everything.

22 Does that make sense?

23 (Jury panel nodding affirmatively.)

24 **THE COURT:** Okay. So, Ms. Williams, did the verdict
25 form, as Ms. Melen read it, accurately reflect where the jury

1 came out on all the questions?

2 **FOREPERSON WILLIAMS:** Yes.

3 **THE COURT:** Ms. Branson?

4 **JUROR BRANSON:** Yes.

5 **THE COURT:** Mr. Miller?

6 **JUROR MILLER:** Yes.

7 **THE COURT:** Ms. Jones?

8 **JUROR JONES:** Yes.

9 **THE COURT:** Ms. Huang?

10 **JUROR HUANG:** Yes.

11 **THE COURT:** Mr. Galbreth?

12 **JUROR GALBRETH:** Yes.

13 **THE COURT:** Mr. North?

14 **JUROR NORTH:** Yes.

15 **THE COURT:** Mr. Fernandez?

16 **JUROR FERNANDEZ:** Yes.

17 **THE COURT:** Okay. So I am then declaring a mistrial
18 on Question 2 on the conspiracy claim with respect to Anthony
19 Gates and Eric Healy.

20 Now, I have some slightly bad news for you, and this is
21 a -- this is something that is unavoidable. We don't really
22 know how -- we judges sort of scratch our heads and try to
23 figure out how to sort of communicate with a jury about this
24 and preserve the fairness for the parties, and we haven't
25 figured out a great way to do it yet.

1 But there is going to be a small amount of additional
2 evidence that you need to consider, and you need to consider
3 that small amount of additional evidence in connection with the
4 question of damages. What are the damages, if any, to which
5 Mr. Perez is entitled in this case.

6 And some of the evidence that you will hear -- although
7 it's a very small amount of evidence, some of the evidence that
8 you will hear is personal in nature to the defendants. We are
9 concerned that some of the evidence you hear in connection with
10 damages sort of interferes with the jury's consideration of the
11 liability question. So that's why we separate it out like
12 that.

13 So I sort of apologize for springing that upon you. I
14 discussed it just now with the lawyers and they have informed
15 me that -- the plaintiff's lawyers have informed me that their
16 presentation, their evidentiary presentation, will be no longer
17 than 45 minutes and the lawyers for the defendants have
18 informed me that their evidentiary presentation will be no
19 longer than an hour. I expect it to be -- I expect that for
20 both sides it will be shorter than that, but they -- you know,
21 always try to sort of give themselves a little room in
22 providing these estimates.

23 And then there will be very, very, very short closing
24 arguments. I'm thinking, like, you know, five to ten minutes
25 for each side.

1 Then you will deliberate on the question of damages. You
2 will get a set of instructions on damages. I don't anticipate
3 that it will be nearly as complicated as what you've done thus
4 far.

5 So I want to thank you for the, obviously, very hard work
6 that you've done so far and the very conscientious effort that
7 you've put in to your deliberations and the attentiveness that
8 you've shown during the case so far. I just ask you to be
9 patient with me and give me just a little bit more time and
10 come back tomorrow. We'll get you breakfast. We'll get you
11 lunch. I'm sure you were horrified at the thought of missing
12 another free lunch from the District Court.

13 And with that, I suggest that you -- well, not "I
14 suggest." We're done for today and we'll see you back here
15 tomorrow morning at 8:30 for the beginning of presentation of
16 evidence for what I assure you will be the last phase of this
17 trial.

18 Thank you.

19 (Jury exits courtroom at 4:49 p.m.)

20 **THE COURT:** Was that a suicidal scream I heard?

21 Okay. So we will see -- I guess we need to think about --
22 we need to prepare jury instructions for damages. We'll spend
23 this evening looking through what the parties have submitted
24 and put something together and have something for you. We'll
25 either file it this evening so you can look at it this evening

1 or we'll give it to you first thing tomorrow morning.

2 We'll look at the verdict form that you proposed for
3 damages.

4 Is there anything else that we can do for you, other than
5 looking at the jury instructions and the verdict form?

6 **MS. NYGAARD:** Your Honor, defendants have an issue to
7 bring up.

8 The Court had issued an order at the beginning of this
9 case precluding defendants from mentioning Mr. Perez's First
10 Amendment activities subsequent to the search because of the
11 chilling effect standard. At this point we would be asking
12 permission to bring up that for the damages phase because we
13 believe it's very relevant, to the extent of Mr. Perez's
14 injuries, that he continued to write articles and get them
15 published.

16 **THE COURT:** Yeah. I mean, I -- I'll hear from the
17 plaintiff.

18 **MR. BENEDETTO:** I mean, we intend to provide evidence
19 of Mr. Perez's First Amendment activity that pre-dates the
20 search and we think it is a subjective -- you know, the harm is
21 actual harm. So we -- you know, post-October 2012 activity I
22 think is admissible.

23 **THE COURT:** Is admissible?

24 **MR. BENEDETTO:** Yes.

25 **THE COURT:** Yeah, yeah.

1 **MS. NYGAARD:** Although defendants would still be
2 asking that the actual articles that he wrote not be admitted,
3 just the subject matter that he did write articles. Under
4 Rule 403 we find the contents of the articles that he wrote
5 would be overly prejudicial to the jury.

6 **THE COURT:** Mr. Benedetto doesn't seem to be
7 disagreeing with you, so I will cut you off.

8 **MR. BENEDETTO:** That's correct.

9 **THE COURT:** That's correct, okay.

10 So, plus, I mean, I think we have an obligation, sort of
11 given how long the jury has spent and given how conscientious
12 they have been in their deliberations, regardless of what we
13 think of the correctness of the outcome, they have certainly
14 put in a great effort and I think we sort of have a special
15 obligation to be as efficient as we can in the presentation of
16 evidence.

17 And in that regard I -- you know, although there -- there
18 may be some relevance to his prior First Amendment activity and
19 his subsequent First Amendment activity, I don't know if
20 it's -- you know, I don't really know how much time needs to be
21 spent on that sort of thing. I mean, it seems like it's five
22 minutes worth of evidence. You can sort of establish that.

23 Anything else?

24 **MR. BENEDETTO:** A precise limit on the closing might
25 be helpful. Ten minutes?

1 **THE COURT:** Certainly no more than 10 minutes.

2 **MR. BENEDETTO:** Okay. I think 10 minutes -- 10
3 minutes is fine.

4 Is that okay, Ms. Nygaard?

5 **MS. NYGAARD:** Yes. And will there be a brief opening
6 statement also?

7 **THE COURT:** I don't think it's necessary.

8 **MS. NYGAARD:** Okay.

9 **THE COURT:** Two minutes for rebuttal?

10 **MR. BENEDETTO:** That's fine.

11 **THE COURT:** Okay.

12 **MR. BENEDETTO:** One, I guess, additional item that we
13 would flag for the Court has to do with the punitive damages,
14 the presentation of evidence with respect to Officer Gates'
15 personal finances and whether by putting those finances at
16 issue, the indemnification issue is -- may be broached. There
17 is -- we have found --

18 **THE COURT:** So I was actually pondering this. I
19 mean, when I was working in the San Francisco City Attorney's
20 Office and represented police officers, I could have sworn that
21 we did not indemnify our officers for punitive damages.

22 **MS. NYGAARD:** It's in the Government Code. The
23 California Government Code actually precludes the state or CDCR
24 from paying punitive damages. They would have to go to the
25 state legislature and seek permission, et cetera.

1 So we feel that putting -- Officer Gates' financial
2 information is very relevant because there is no guarantee the
3 state would pay for it and they are precluded from doing it
4 without legislative action.

5 **THE COURT:** So I don't understand what is -- what's
6 the -- what do you want the jury to know or not know about
7 indemnification?

8 **MR. BENEDETTO:** Right. We're not going to imply that
9 there was a mandatory indemnification statute in place for
10 purposes of punitive damages, but whether the defendant could
11 be cross examined as to the possibility that those damages
12 could be indemnified.

13 **THE COURT:** No. I'm not going to allow that.

14 **MR. BENEDETTO:** Okay.

15 **THE COURT:** Anything else?

16 **MS. NYGAARD:** Nothing.

17 **MR. BENEDETTO:** Nothing. No.

18 **THE COURT:** Okay. We'll see you tomorrow at 8:30.
19 I'll be here -- why doesn't everybody plan on being here at
20 8:00 o'clock.

21 We might consider pre-instructing the jury, if we have it
22 ready and we can all sort of reach agreement on the
23 instructions. That might make it a little more helpful for
24 them in terms of considering the evidence that comes in. We
25 can think about that. But at a minimum everybody should be

1 here at 8:00 o'clock tomorrow.

2 **MR. BENEDETTO:** Okay.

3 **THE COURT:** Thanks.

4 **MS. NYGAARD:** Thank you.

5 **THE CLERK:** Court is adjourned.

6 (Whereupon at 4:56 p.m. further proceedings were
7 adjourned until Wednesday, November 25, 2015 at
8 8:00 a.m.)
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CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript from
the record of proceedings in the above-entitled matter.

Debra L. Pas

Debra L. Pas, CSR 11916, CRR, RMR, RPR

Tuesday, November 24, 2015